

STATE OF MICHIGAN
COURT OF APPEALS

CHESTNUT DEVELOPMENT, LLC,

Plaintiff-Appellant,

v

TOWNSHIP OF MARION,

Defendant-Appellee.

UNPUBLISHED

June 22, 2010

No. 287312

Livingston Circuit Court

LC No. 04-020966-CZ

CHESTNUT DEVELOPMENT, LLC,

Plaintiff-Appellant/Cross-Appellee,

v

TOWNSHIP OF MARION,

Defendant-Appellee/Cross-Appellant

No. 292894

Livingston Circuit Court

LC No. 04-020966-CZ

Before: BANDSTRA, P.J., and FORT HOOD and DAVIS, JJ.

PER CURIAM.

In docket number 287312, plaintiff appeals as of right the trial court's judgment in favor of defendant in this action arising from defendant's denial of plaintiff's rezoning application. In docket number 292894, plaintiff appeals, and defendant cross-appeals, the trial court's award of \$6,070 to defendant as taxable costs for expert witness fees. We affirm the trial court's judgment in favor of defendant. We also affirm the trial court's determination that defendant is entitled to recover reasonable expert witness fees incurred in preparation for trial. However, we vacate the trial court's award of \$6,070 for expert witness fees and remand for redetermination of the taxable amount of such fees. Additionally, we conclude that defendant's ordinance §§ 6.27 and 6.30 are preempted by the Natural Resources and Environmental Protection Act, MCL 324.101 *et seq.* (NREPA).

FACTUAL BACKGROUND AND PROCEEDINGS BELOW

Plaintiff owns approximately 136 acres, zoned SR (Suburban Residential), located in the northwest corner of the township (the property). As currently zoned, the property, which does

not have access to public sewer and water service, requires a minimum lot size of .75 acres. Based on engineering studies, it has been determined that the majority of the property lacks suitable soils to permit septic fields that would meet appropriate standards.¹ The majority of plaintiff's property is located in defendant's wellhead protection area. Therefore, plaintiff is prohibited, by zoning ordinance § 6.27, from constructing and operating a private wastewater treatment facility on the portion of its property within the wellhead protection area. Further, ordinance § 6.30 prohibits private wastewater treatment facilities from treating waste generated by non-residential sources. Plaintiff asserts that as currently zoned, without access to public sewer and in the absence of a private wastewater treatment system, the potential development of the property is limited to 41 single-family residential lots, at a cost exceeding the market value of the lots. Plaintiff further asserts that such development is not economically viable.

In December 2003, plaintiff requested that defendant rezone the property UR (Urban Residential). This zoning classification would permit single-family residential dwellings on lots with a minimum size of 12,000 square feet or, as part of a Planned Unit Development (PUD), a minimum size of 10,370 square feet for single-family detached units or 8,700 square feet for single-family attached units. At the same time, plaintiff filed an application for approval of a mixed-use PUD for the property, referred to as Red Hawk Landing, which was premised on the property being zoned UR and which was to include 305 single-family homes, a senior living center, daycare center and a grocery store.

Defendant acted on plaintiff's rezoning request independently of, and without considering, the PUD application. Consequently, defendant considered that rezoning plaintiff's property to the UR classification would permit plaintiff to construct up to 1,000 attached multi-family units on the property, rather than the 305 single-family units plus attendant uses plaintiff sought to develop under its proposed PUD. Noting, in part, that the area surrounding the property consisted of property zoned SR or Agricultural Residential (AR), which requires minimum lots of 2 acres, defendant denied plaintiff's rezoning request in May 2004. Thereafter, defendant declined to consider plaintiff's PUD request because it lacked the necessary underlying zoning classification (UR).

Plaintiff filed the instant action asserting that defendant violated its constitutional rights to substantive due process and equal protection and that defendant's decisions constituted exclusionary zoning under MCL 125.297a, as well as a taking under the federal and Michigan Constitutions. Defendant moved for, and was granted, partial summary disposition on the equal protection and exclusionary zoning claims.² Plaintiff moved for, and was denied, partial summary disposition on its assertion that defendant's private sewer ordinances, ordinance §§ 6.27 and 6.30, are preempted by NREPA. The case proceeded to trial on plaintiff's

¹ Defendant's sewer district borders the property immediately to the southwest. Plaintiff requested that defendant amend its sewer district to allow the extension of sewer and water service to the property at plaintiff's cost, after confirming that the system possessed sufficient capacity to accommodate the property. Plaintiff's request was not granted.

² Plaintiff has not appealed that decision and those claims are not at issue here.

substantive due process and takings claims. At the conclusion of the presentation of plaintiff's case, the trial court granted defendant's motion to dismiss those claims pursuant to MCR 2.504(B)(2).³ Judgment was entered in defendant's favor in accordance with that ruling. The trial court expressly declined to rule on plaintiff's assertion that defendant's private sewer ordinances were preempted by NREPA, finding it unnecessary to do so to resolve the claims before it.

Following entry of judgment in its favor, defendant moved to tax costs, seeking expert witness fees in the amount of \$38,279.50. The trial court concluded that defendant was entitled to recover expert witness fees incurred in preparation for trial and awarded defendant \$6,070 in such fees.

PLAINTIFF'S SUBSTANTIVE DUE PROCESS AND TAKINGS CLAIMS

Plaintiff challenges the trial court's decision to involuntarily dismiss its substantive due process and takings claims at the close of plaintiff's presentation of evidence at trial. Plaintiff argues that the trial court's decision to involuntarily dismiss these claims was against the great weight of the evidence and was founded on the application of incorrect legal principles, and thus, must be reversed. We disagree.

"The involuntary dismissal of an action is appropriate where the trial court, sitting as the finder of fact, is satisfied at the close of the plaintiff's evidence that 'on the facts and the law the plaintiff has shown no right to relief.'" *Samuel D Begola Servs, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995), quoting MCR 2.504(B)(2). A plaintiff is not afforded the advantage of the most favorable interpretation of the evidence, but rather the trial court is called upon to act as a trier of fact. *Marderosian v The Stroh Brewery Co*, 123 Mich App 719, 724; 333 NW2d 341 (1983). Therefore, this Court reviews a decision to grant or deny a motion for involuntary dismissal under the clearly erroneous standard; the trial court's decision will not be overturned unless the evidence manifestly preponderates against the decision. *Phillips v Deihm*, 213 Mich App 389, 397; 541 NW2d 566 (1995); *Sullivan Indus, Inc v Double Seal Glass Co, Inc*, 192 Mich App 333, 339; 480 NW2d 623 (1991). A finding is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. MCR 2.613(C); *Carrier Creek Drain Drainage Dist v Land One, LLC*, 269 Mich App 324, 329; 712 NW2d 168 (2005). In reviewing the trial court's findings of fact, regard is to be given to the trial

³ MCR 2.504(B)(2) provides:

In an action, claim, or hearing tried without a jury, after the presentation of the plaintiff's evidence, the court, on its own initiative, may dismiss, or the defendant, without waiving the defendant's right to offer evidence if the motion is not granted, may move for dismissal on the ground that, on the facts and the law, the plaintiff has no right to relief. The court may then determine the facts and render judgment against the plaintiff, or may decline to render judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in MCR 2.517.

court's special opportunity to evaluate the credibility of the witnesses who appeared before it. *Morris v Clawson Tank Co*, 459 Mich 256, 271; 587 NW2d 253 (1998). This Court reviews any issues of law de novo and reviews the trial court's underlying findings of fact for clear error. *Sands Appliance Servs, Inc v Wilson*, 463 Mich 231, 235-236 n 2, 238; 615 NW2d 241 (2000).

Both the Michigan and United States Constitutions guarantee that no person shall be deprived of life, liberty, or property without due process of law. US Const, Am XIV; Const 1963, art 1, § 17. "The essence of a claim of a violation of substantive due process is that the government may not deprive a person of liberty or property by an arbitrary exercise of power." *Landon Holdings, Inc v Grattan Twp*, 257 Mich App 154, 173; 667 NW2d 93 (2003). In *A & B Enterprises v Madison*, 197 Mich App 160, 162; 494 NW2d 761 (1992), this Court explained that

[i]n order to successfully challenge a zoning ordinance, a plaintiff must prove (1) that there is no reasonable governmental interest being advanced by the present zoning classification, or (2) that the ordinance is unreasonable because of a purely arbitrary, capricious and unfounded exclusion of other types of legitimate land use from the area under consideration. . . .

Judicial review of a substantial due process challenge requires application of three rules: (1) the ordinance is presumed valid; (2) the challenger has the burden of proving that the ordinance is an arbitrary and unreasonable restriction upon the owner's use of the property . . . ; and (3) the reviewing court gives considerable weight to the findings of the trial judge.

Further, this Court has recently emphasized that "[t]o sustain a substantive due process claim against municipal actors, the governmental conduct must be so arbitrary and capricious as to shock the conscience." *Mettler Walloon LLC v Melrose Twp*, 281 Mich App 184, 198; 761 NW2d 293 (2008).⁴

In *Village of Euclid v Ambler Realty Co*, 272 US 365, 395; 47 S Ct 114; 71 L Ed 303 (1926), the United States Supreme Court held that a municipal zoning ordinance would survive a substantive due process challenge so long as it was not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." In *Brae*

⁴ While the bulk of Michigan jurisprudence relating to substantive due process claims in land use cases frames the question as a "challenge to a zoning ordinance," see, e.g., *Kropf*, 391 Mich 157; *Yankee Springs v Fox*, 264 Mich App 604, 609; 692 NW2d 728 (2004), the same standards are applied to cases in which a landowner challenges the denial of a rezoning request, see *A & B Enterprises v Madison*, 197 Mich App 160, 161-162; 494 NW2d 761 (1992) (explicitly applying the same framework to challenge of denial of rezoning). Moreover, there is no substantive difference between these kinds of claims. In either case, the landowner is asserting that the existing zoning classification is not reasonable and justified, whether the unreasonableness is manifested as the original creation of the classification or the subsequent affirmation of the classification by the municipality's denial of a rezoning request. Further, in either case, the landowner is seeking to demonstrate that another classification is more appropriate for the land.

Burn, Inc v City of Bloomfield Hills, 350 Mich 425, 431; 86 NW2d 166 (1957), our Supreme Court stated that “[i]n view of the frequency with which zoning cases are now appearing before this Court, we deem it expedient to point out again, in terms not susceptible of misconstruction, a fundamental principle: this Court does not sit as a super-zoning commission”; an “ordinance comes to us clothed with every presumption of validity.” *Id.* at 432. The Court added:

This is not to say, of course, that a local body may with impunity abrogate constitutional restraints. The point is that we require more than a debatable question. We require more than a fair difference of opinion. It must appear that the clause attacked is an arbitrary fiat, a whimsical *ipse dixit*, and that there is no room for a legitimate difference of opinion concerning its reasonableness. [*Id.*]

“[I]t is the burden of the party attacking to prove affirmatively that the ordinance is an arbitrary and unreasonable restriction upon the owner’s use of his property.” *Id.* See also, *Kropf v City of Sterling Heights*, 391 Mich. 139, 162; 215 NW2d 179 (1974) (adopting the statements quoted above).

Plaintiff argues that, because this case presents a challenge to a discrete zoning decision affecting only its property, and not a challenge to the adoption of a zoning ordinance, the presumption of validity afforded a zoning ordinance does not apply here. Instead, plaintiff asserts the trial court was required to determine whether the decision to deny the request for rezoning advanced a legitimate government interest, whether it was an unreasonable means of advancing a legitimate government interest, and whether it unreasonably, arbitrarily, and capriciously excluded other types of legitimate land uses from the area in question. Plaintiff cites *City of Essexville v Carrollton Concrete Mix, Inc*, 259 Mich App 257; 673 NW2d 815 (2003) in support of this assertion. In *Essexville*, 259 Mich App at 259-263, this Court considered a claim that the defendant city engaged in illegal spot zoning when it rezoned the plaintiff’s property from an industrial district to a development district, purportedly for the purpose of lowering the value of the land, so that the property could later be acquired, as provided in the master plan, as part of a scheme to improve the residential character of the city. The trial court, relying on *Penning v Owens*, 340 Mich 355; 65 NW2d 831 (1954), and *Anderson v Twp of Highland*, 21 Mich App 64; 174 NW2d 909 (1969), determined that the city clearly singled out the plaintiff’s property to be used as a park when the surrounding property was industrial and that there was no reasonable basis for the rezoning other than that the city wanted river access. *Essexville*, 259 Mich App at 265. On appeal, this Court held:

[W]hen a discrete zoning decision is made regarding a particular parcel of property – typically a decision involving an amendment or variance that results in allowing uses for specific land that are inconsistent with the overall plan as established by the ordinance — the courts will apply greater scrutiny. Those isolated or discrete decisions are more prone to arbitrariness because they are micro in nature, i.e., the decisions are based on the particular land and circumstance at issue in the request for amendment or variance. To the contrary, macro decisions made by the local body, such as the enactment of a new zoning ordinance, typically reflect a decision on how the city will be developed in the years to come, i.e., are made pursuant to an overall plan of action. [*Id.* at 274.]

That said, however, this Court determined that the *Penning* and *Anderson* “arbitrariness of zoning ordinances” test did not apply to the case before it, because the defendant’s decision to rezone the plaintiff’s property was made pursuant to a plan and was not a haphazard or piecemeal decision, and therefore, it did not constitute spot zoning. *Id.* at 275-277. Therefore, instead of applying *Penning* and *Anderson*, this Court applied the deferential *Brae Burn* and *Kropf* “general principles of reasonableness” test, including its presumption of validity. *Id.* at 274-275.

As in *Essexville*, the instant case is not a spot zoning case; as in *Essexville*, defendant’s decision to rezone the plaintiff’s property was made pursuant to a plan and was not a haphazard or piecemeal decision. Rather, it was a refusal by defendant to change a macro decision concerning the manner in which the township will be developed pursuant to defendant’s master plan. Therefore, the trial court correctly evaluated plaintiff’s substantive due process claim under the *Brae Burn* and *Kropf* deferential “general principles of reasonableness” test.

Further, even if the stricter scrutiny approach advocated for by plaintiff was applicable here, the trial court stated that it “would still have dismissed [p]laintiff’s substantive due process claim based, in part, on the inconsistency of [p]laintiff’s proposed development with defendant’s Master Plan and the lack of public sewer services.” We agree. Before deciding against plaintiff’s rezoning request, defendant considered advice from its planning consultant, the nature of the surrounding property, the absence of sewer service, and the notation in the county comprehensive plan that sewer should not be extended to property such as plaintiff’s. The trial court did not err by dismissing plaintiff’s substantive due process claim under either standard of evaluation.⁵

Turning to the trial court’s decision to dismiss plaintiff’s regulatory takings claim, we again conclude that the trial court’s decision was not against the great weight of the evidence, nor was it based on an incorrect application of relevant law. Therefore, reversal is not warranted.

Both the United States and Michigan constitutions prohibit the taking of private property for public use without just compensation. US Const, Am V; Const 1963, art 10, § 2; *Dorman v Clinton Twp*, 269 Mich App 638, 645; 714 NW2d 350 (2006). A governmental agency may

⁵ Plaintiff also argues that the trial court erred by applying the “legitimate difference of opinion” analysis set forth in *Conlin v Scio Twp*, 262 Mich 379; 686 NW2d 16 (2004), on the basis that this standard was overturned in *Newman Equities v Charter Twp of Meridian*, 474 Mich 911; 705 NW2d 111 (2005). We note that, as pointed out by defendant, the Supreme Court’s order in *Newman Equities*, does not mention *Conlin*, or any of the authorities relied on by *Conlin* by name. Further, *Conlin* was summarizing prior Supreme Court case law regarding the appropriate standards; it did not create new law. Further, while the trial court mentioned that plaintiff “failed to establish that there is no room for a legitimate difference of opinion concerning the reasonableness of the Zoning Ordinance,” the trial court also relied on the standards set forth in *Kropf*, 391 Mich 139, and *Brae Burn*, 350 Mich 425, which remain good law and are not implicated in any way by the Supreme Court’s order in *Newman Equities*.

effectively “take” property by overburdening it with regulation. *K & K Constr v DNR*, 456 Mich 570, 576; 575 NW2d 531 (1998). As our Supreme Court explained in *K & K Constr*,

While all taking cases require a case-specific inquiry, courts have found that land use regulations effectuate a taking in two general situations: (1) where the regulation does not substantially advance a legitimate state interest, or (2) where the regulation denies an owner economically viable use of his land.

The second type of taking, where the regulation denies an owner of economically viable use of land, is further subdivided into two situations: (a) a “categorical” taking, where the owner is deprived of “all economically beneficial or productive use of land,” or (b) a taking recognized on the basis of the application of the traditional “balancing test” established in *Penn Central Transp Co v New York City*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978).

In the former situation, the categorical taking, a reviewing court need not apply a case-specific analysis, and the owner should automatically recover for a taking of his property. A person may recover for this type of taking in the case of a physical invasion of his property by the government (not at issue in this case), or where a regulation forces an owner to “sacrifice *all* economically beneficial uses [of his land] in the name of the common good” In the latter situation, the balancing test, a reviewing court must engage in an “ad hoc, factual inquir[y],” centering on three factors: (1) the character of the government’s action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations. [*Id.* at 576-577 (citations omitted).]

With regard to the economic effect prong of this balancing test, “a mere diminution in property value . . . does not amount to a taking.” *Bevan v Brandon Twp*, 438 Mich 385, 402-403; 475 NW2d 37 (1991).

Plaintiff first argues that defendant’s decision to deny its rezoning petition constituted a categorical taking because the decision deprived it of any economically beneficial use of the land. We disagree. The categorical taking test does not guarantee property owners a certain minimum economic profit from the use of their land. *Paragon Props Co v Novi*, 452 Mich 568, 579 n 13; 550 NW2d 772 (1996); *Sun Oil Co v City of Madison Heights*, 41 Mich App 47, 56; 199 NW2d 525 (1972) (“The test of a zoning ordinance’s constitutionality is not profitability”). “[I]t is well established that a municipality is not required to zone property for its most profitable use, and that ‘mere diminution in value does not amount to [a] taking.’” *Dorman*, 269 Mich App 638, quoting *Bell River Assoc v China Twp*, 223 Mich App 124, 133; 565 NW2d 695 (1997). A “[p]laintiff cannot establish a confiscation by simply showing a disparity in value between uses.” *Gackler Land Co v Yankee Springs Twp*, 427 Mich 562, 572; 398 NW2d 393 (1986). “A plaintiff who asserts that he was ‘denied economically viable use of his land’ must show something more – ‘that the property was either unsuitable for use as zoned or unmarketable as zoned.’” *Dorman*, 269 Mich App at 647, quoting *Bell River*, 223 Mich App at 133, quoting *Bevan*, 438 Mich at 403. To establish a categorical regulatory taking, “the property owner must be *completely deprived* of economically beneficial use of his property[.]” *K & K Constr*, 456 Mich at 586 (emphasis added).

Plaintiff asserts that there was no evidence presented to permit the trial court to find that market conditions impacted the economics of developing the property. We agree. However, even in the absence of such evidence, plaintiff's categorical takings claim fails. Plaintiff asserts that it established that there was no other alternative layout or potential development of the property that would be more economically beneficial than its 41-unit plan, which would result in a loss of more than \$40,000 per lot. However, plaintiff acknowledged that it did not pursue any PUD request under its current SR zoning, did not evaluate the potential for splitting the property for development, and it presented no evidence indicating that it could not use the property in some other economically viable manner, or that the property was unmarketable, for some use, as zoned. Thus, plaintiff did not establish that it was completely deprived of all economically beneficial uses of the property.

Further, given that there were no changed conditions affecting the development of the property and no changes in zoning between the time plaintiff purchased the property and the time plaintiff filed its complaint, that plaintiff paid more than \$1 million for the property as zoned would seem to belie the assertion that the property lacks value as zoned. Therefore, considering the record presented, the trial court did not clearly err by concluding that plaintiff failed to establish a categorical taking of its property resulting from defendant's denial of the request for rezoning.

Plaintiff also argues that the trial court erred by concluding that it failed to establish a taking under the *Penn Central* balancing test. Again, on the record presented, we disagree.

In *K & K Constr*, 456 Mich at 578, our Supreme Court held that, in applying the *Penn Central* balancing test, courts "must engage in an 'ad hoc, factual inquir[y],' focusing on three factors: (1) the character of the government's action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations. In *Lingle v Chevron USA Inc*, 544 US 528, 539; 125 S Ct 2074 161 L Ed 2d 876 (2005) the United States Supreme Court noted that

all regulatory takings . . . inquiries . . . share a common touchstone. Each aims to identify regulatory actions that are *functionally equivalent to the classic taking* in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights.

Accordingly, "the *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Id.* at 540.

In the present case, the "character" of defendant's action is the denial of plaintiff's rezoning petition. Defendant's denial of the request for rezoning does not amount to a physical taking, thus, "[t]he relevant inquiry regarding the character of the government's action is whether it singles [a] plaintiff[] out to bear the burden for the public good and whether the regulation being challenged 'is a comprehensive, broadly based regulatory scheme that burdens and benefits all citizens relatively equally.'" *Cummins v Robinson Twp*, 283 Mich App 677, 720; 770 NW2d 421 (2009); *K & K Constr*, 267 Mich App at 523. This Court has recognized that zoning regulations are generally "comprehensive, universal, and ubiquitous, and provide an

‘average reciprocity of advantage’ for all property owners[.]” *Id.* at 531. That is true here. And, indeed, defendant’s decision here was to decline to treat plaintiff’s property differently than that of other landowners in the township. Plaintiff did not establish that defendant’s decision to deny its rezoning petition was arbitrary or capricious; rather, it was based on the master plan and the comprehensive county plan, on considerations of the zoning classifications and uses of the surrounding property, and on future development of defendant township, and was consistent with the recommendation of defendant’s Planning Commission, the County Planning Commission and defendant’s planning consultant. Therefore, the character of defendant’s action does not favor a finding that a taking resulted.

The next factor, the economic impact of the decision, presents a somewhat closer question. As noted above, plaintiff presented evidence that it was not economically beneficial to develop the property as zoned, with single-family homes utilizing septic systems. However, plaintiff did not establish that it considered other uses for the property, such as applying for a PUD under the SR zoning classification, or that it attempted to market the property for sale. And, plaintiff’s own conduct in purchasing the property for a substantial price, with knowledge of the soil conditions and zoning classification, belies the notion that the property lacks value or that defendant’s decision, leaving plaintiff in exactly the same position it was in when it purchased the property, deprived plaintiff of existing economic value, as opposed to value that could be obtained if the property could be developed under a different classification. Plaintiff’s principal admitted that, as with all land deals, the purchase of the property was a risk, premised on the hope that he could obtain rezoning, PUD approval and/or an extension of the public sewer district to the property, none of which was guaranteed at any point in time. Further, defendant notes, that at a May 13, 2004 Township Board meeting, plaintiff’s principal represented that he “could have sold this property several times over by now, and made my money and been gone.” Therefore, this factor also does not favor a finding that a taking has occurred.

Finally, concerning investment-backed expectations, the evidence showed that plaintiff purchased the property with full knowledge of its zoning classification and that the soils were of limited suitability for economically advantageous development. Our Supreme Court has recognized that “[i]nvestment-backed expectations are distinguishable from mere financial speculation.” *Paragon Props*, 452 Mich at 579. Further, “[t]he Taking Clause does not guarantee property owners an economic profit from the use of their land . . . ‘[t]he interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests.’ Furthermore, the mere diminution of property value by application of regulations without more does not amount to an unconstitutional taking.” *Id.* at 579, n 13 (citations omitted).

Although a person’s knowledge of a regulatory enactment does not act as an absolute bar to a takings claim based on the regulation, a “key factor” in determining whether a regulation has interfered with investment backed expectations “is notice of the applicable regulatory regime[.]” *K & K Constr*, 267 Mich App at 555. Plaintiff was aware, when it acquired its interest in the property, that it was zoned SR. Such notice “should . . . be taken into account” and “does . . . shape the analysis of whether plaintiff’s expectations were reasonable.” *Id.* at 555, 557. Plaintiff’s desired development of the property required that the property be rezoned, that a PUD application be approved and that the sewer be extended to the property. By plaintiff’s admission, none of these things were certain to occur. Any “expectation” that plaintiff would reap profits

from development of the property as Red Hawk Landing was “mere financial speculation” under such circumstances.

In sum, none of the factors of the *Penn Central* balancing test favor plaintiff’s argument that defendant’s decision to deny the rezoning request constituted a regulatory taking. Therefore, the trial court’s decision that plaintiff failed to establish in its case in chief that defendant’s actions constituted a taking was neither clearly erroneous nor against the great weight of the evidence.

PREEMPTION

Plaintiff asserts that the trial court erred by denying its motion for partial summary disposition on the basis that defendant’s private sewer ordinances are preempted by NREPA. We agree. In doing so, we note that ordinance §§ 6.27 and 6.30 are only tangentially related, if at all, to the trial court’s determination of the propriety of defendant’s zoning decisions, and that our determination that these sections are preempted by NREPA, while perhaps impacting plaintiff’s future development of the property, has no effect on resolution of plaintiff’s substantive due process and takings claims, and does not affect the instant judgment entered in favor of defendant.

“This Court reviews de novo a trial court’s decision to grant or deny summary disposition. Likewise, we review de novo the application of the theory of preemption, which is an issue of statutory interpretation.” *Howell Twp v Roto Corp*, 258 Mich App 470, 475; 670 NW2d 713 (2003) (citations omitted).⁶ Townships have no inherent powers; they possess only those limited powers conferred on them by the Legislature or the state constitution. *Hess v Cannon Twp*, 265 Mich App 582, 590; 696 NW2d 742 (2005). The township ordinance act,

⁶ Defendant argues that the trial court’s decision was proper because plaintiff did not seek relief on this issue in its complaint. Defendant cites *Dacon v Transue*, 441 Mich 315, 327-329; 490 NW2d 369 (1992), for the proposition that a party may not seek relief under a theory or claim when the party’s pleadings do not provide reasonable notice to the defendant of that theory or claim, because “[l]eaving a defendant to guess upon which grounds plaintiff believes recovery is justified violates basic notions of fair play and substantial justice.” Defendant also cites *City of Bronson v American States Ins Co*, 215 Mich App 612, 618-619; 546 NW2d 702 (1996), and *Reid v Michigan*, 239 Mich App 621, 630; 609 NW2d 218 (2000) in support of its argument. However, *City of Bronson* and *Reid* are distinguishable from the instant case; in those cases the trial court was acting of its own accord regarding a theory of relief or issue that was not raised by the plaintiffs at any time before or during trial. Here, although the complaint does not set forth plaintiff’s preemption claim, plaintiff did raise the issue more than 22 months before trial, in its motion for summary disposition. Thus, there was no element of surprise regarding this claim. Further, the issue presented is one of law and it has the potential to re-arise between these same parties regarding this same property in the future. Therefore, in the interest of judicial efficiency, we choose to address it. See, *Detroit Leasing Co v Detroit*, 269 Mich App 233, 237-238; 713 NW2d 269 (2005); *Tingley v Kortz*, 262 Mich App 583, 588; 688 NW2d 291 (2004).

MCL 41.181, allows townships to enact ordinances that regulate the public health, safety, and general welfare. “While the provisions of the Constitution and law regarding counties, townships, cities, and villages must be liberally construed in their favor, the powers granted to townships by the Constitution and by law must include only those fairly implied and not prohibited by the Constitution. Const 1963, art 7, § 34.” *Howell Twp*, 258 Mich App at 475-476. Accordingly, an ordinance may not preempt state law.

State law preempts a municipal ordinance where the ordinance directly conflicts with a state statute or where the statute completely occupies the field that the ordinance attempts to regulate. *Rental Prop Owners Ass’n of Kent Co v Grand Rapids*, 455 Mich 246, 257; 566 NW2d 514 (1997); *McNeil v Charlevoix Co*, 275 Mich App 686, 697; 741 NW2d 27 (2007), aff’d 484 Mich 69 (2009); *Czymbor’s Timber, Inc v Saginaw*, 269 Mich App 551, 555; 711 NW2d 442 (2006), aff’d 478 Mich 348 (2007); *Mich Coalition for Responsible Gun Owners v City of Ferndale*, 256 Mich App 401, 408; 662 NW2d 864 (2003). A direct conflict exists when the ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits. *People v Llewellyn (City of East Detroit v Llewellyn)*, 401 Mich 314, 322 n 4; 257 NW2d 902 (1977); *Howell Twp*, 258 Mich App at 476-477.

Plaintiff first asserts that “the Michigan appellate courts have uniformly held that NREPA demands exclusive regulation of [wastewater treatment systems] by the MDEQ,” and thus that NREPA completely occupies the field of regulation regarding private wastewater treatment systems so as to preempt defendant’s private sewer ordinance. Plaintiff cites this Court’s decisions in *Lake Isabella Dev, Inc v Mich Dep’t of Environmental Quality*, 259 Mich App 393; 675 NW2d 40 (2003), and *City of Brighton v Hamburg Twp*, 260 Mich 345; 677 NW2d 349 (2004) in support of this assertion.

In *Lake Isabella*, 259 Mich App at 395-396, 412, this Court affirmed a trial court decision granting the plaintiff developer summary disposition regarding an administrative rule, promulgated by the Department of Environment Quality (DEQ), that required that applicants seeking to construct a private sewerage system obtain a resolution from the local government agency agreeing to take over the sewerage system if the owner failed to properly operate or maintain it. This Court determined that the rule was “arbitrary and capricious because it constitutes an unlawful delegation of discretionary power to municipalities” and was not in compliance with the legislative intent of the DEQ’s enabling statute. In the course of that decision, which did not involve the question whether NREPA preempted a local ordinance, this Court commented that it could be inferred from MCL 324.4105 that “because both individuals and government agencies are required to obtain [sewerage system] permits from the DEQ, the DEQ has exclusive jurisdiction over those permits.” *Id.* at 407.

At issue in *City of Brighton*, 260 Mich App at 346, was “the question of which level of government, state or local, has the authority to determine the permissible level of chemicals to be deposited in our state’s waters . . . by a government-licensed wastewater treatment plant.” This Court first observed that NREPA provides “no express preemption,” and further that an examination of the legislative history did not conclusively answer the question of whether preemption may be implied. However, the Court concluded that “the ordinance is preempted . . . because (1) the *comprehensive scheme* set forth in part 31 of NREPA clearly occupies the field of regulation that the municipality seeks to enter and (2) the regulated *subject matter* demands

exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest." *Id.* at 350-351. The Court reasoned as follows:

A review of part 31 of NREPA reveals that, through this enactment, the Legislature established a pervasive and detailed state regulatory scheme covering point source discharges and effluent limits. This far-reaching legislation demonstrates the Legislature's intent to achieve uniformity and to serve the public policy interest of protecting the waters of our state.

* * *

The [applicable] provisions [of NREPA] grant the DEQ substantial powers to limit water pollution. Moreover, the DEQ is the only agency authorized to grant a discharge permit for waste effluent into the waters of the state, and any person who desires to discharge or dispose of waste or operate a wastewater treatment plant must apply with and obtain a permit from the DEQ. MCL 324.3112(1). As further evidence of the DEQ's broad powers regarding water pollution, the Legislature expressly gave to the DEQ exclusive criminal and civil enforcement authority. Also, NREPA grants to the DEQ power to seek injunctive relief for any violations of NREPA or for any violation of a permit issued by the DEQ under NREPA.

A careful review of these and other statutory provisions of NREPA lead us to conclude that the Legislature *impliedly intended to preempt the field of regulation regarding discharge of waste into the waters of this state* and the establishment of discharge effluent limits. *Plainly, our Legislature enacted a pervasive state regulatory scheme with the DEQ having sole responsibility for regulation of point source discharges into the waters of our state.* [*Id.* at 352-355 (emphasis added).]

The Court further observed that "[t]he subject matter of the regulation, the control of pollution entering the state's inter-connected waterways, clearly calls for a statewide, uniform system of regulation." *Id.* at 355. Additionally, the Court noted prior decisions holding that state statutes preempt local regulation of solid waste disposal, as well as of hazardous waste disposal, because these areas, too, "require[] statewide treatment." *Id.* at 355-356.

Defendant's ordinance §§ 6.27 and 6.30 plainly attempt to regulate "the discharge of waste into the waters of the state," and, considering testimony presented at trial, they prevent plaintiff from operating a private wastewater treatment plant that would be permissible under state law. Thus, they directly conflict with NREPA by prohibiting that which regulation under the statute might permit. *Llewellyn*, 401 Mich at 322 n 4; *Howell Twp*, 258 Mich App at 476-477. Therefore, this Court concludes that §§ 6.27 and 6.30 of defendant's ordinance are

preempted on the basis that they are in direct conflict with NREPA.⁷

TAXATION OF EXPERT WITNESS FEES

Both parties challenge the trial court's ruling regarding defendant's recovery of expert witness fees as taxable costs following trial. This Court reviews a trial court's determination to award expert witness fees for an abuse of discretion. *Rickwalt v Richfield Lakes Corp*, 246 Mich App 450, 466; 633 NW2d 418 (2001). An abuse of discretion occurs when the court's decision falls outside the range of principled and reasonable outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). Any accompanying issue involving the interpretation and application of a statute involves a question of law that this Court review de novo. *Assoc Builders & Contractors v Dep't of Consumer & Indus Services Dir*, 472 Mich 117; 123-124; 693 NW2d 374 (2005).

MCR 2.625(A) provides that "[c]osts will be allowed to the prevailing party in an action unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action." A trial court has discretion, under MCL 600.2164(1), to award expert witness fees for court time and for the time required to prepare for testifying, as an element of taxable costs to the prevailing party at trial. *Guerrero v Smith*, 280 Mich App 647, 675; 761 NW2d 723 (2008); *Rickwalt*, 246 Mich App at 466; *Herrera v Levine*, 176 Mich App 350, 357-358; 439 NW2d 378 (1989). MCL 600.2164(1) provides:

No expert witness shall be paid, or receive as compensation in any given case for his services as such, a sum in excess of the ordinary witness fees provided by law, unless the court before whom such witness is to appear, or has appeared, awards a larger sum, which sum may be taxed as a part of the taxable costs in the case. Any such witness who shall directly or indirectly receive a larger amount than such award, and any person who shall pay such witness a larger sum than such award, shall be guilty of contempt of court, and on conviction thereof be punished accordingly. [MCL 600.2164(1)]

Plaintiff first asserts that the trial court should not have awarded defendant any expert witness fees because defendant's expert witnesses did not testify at trial in this case, considering that the matter was dismissed at the close of plaintiff's proofs. However, as this Court explained in *Peterson v Fertel*, 283 Mich App 232, 240-241; 770 NW2d 47 (2009).

[T]he statute addressing expert witness fees [MCL 600.2164(1)] does not state that the expert must provide testimony in order to recover expert witness fees . . .

Indeed, it is well settled that, regardless whether the expert testifies, the prevailing party may recover fees for trial preparation. *Miller Bros v Dep't of Natural*

⁷ We are not presented with the question of, nor do we offer any conclusion as to, the propriety of a private wastewater treatment system under the state statutory scheme.

Resources, 203 Mich App 674, 691; 513 NW2d 217 (1994); *Herrera v. Levine*, 176 Mich App 350, 357-358; 439 NW2d 378 (1989). As the Court in *Herrera* explained:

The language “is to appear” in [MCL 600.2164] applies to the situation at bar in which the case was dismissed before defendant had a chance to call its proposed expert witnesses at trial. Furthermore, the trial court was empowered in its discretion to authorize expert witness fees which included preparation fees.

As the trial court here noted, defendant’s expert witnesses did not have the opportunity to testify at trial, because the case was dismissed at the close of plaintiff’s proofs. As the trial court pointed out, were this Court to accept plaintiff’s argument, “it would in essence be punishing defendant for obtaining a directed verdict.” Thus, the trial court did not abuse its discretion by awarding the Township expert witness fees.

That said, however, we conclude that the trial court abused its discretion when determining the amount of taxable expert witness fees. *Guerrero*, 280 Mich App at 675. Plaintiff presented testimony from each of its experts regarding the nature of the services provided on the dates leading up to trial. Rather than rule on whether fees for time spent on certain services were taxable, the trial court simply “arbitrarily” knocked down the amount of those hours, from 80.38 to 20 for one expert, and from 46 and 28 to 10 for two others. The trial court offered no principled basis for its decision, and did not explain how it arrived at these amounts. A trial court abuses its discretion when its decision falls outside the range of principled and reasonable outcomes. *Maldonado*, 476 Mich at 388. There does not seem to be any identifiable or principled basis for the trial court’s decision, and therefore, we find that it constitutes an abuse of discretion. Consequently, we reverse the trial court’s determination of the amount of expert witness fees awarded, but affirm the grant of expert witness fees, and remand for a determination of the amount of fees recoverable consistent with this opinion.⁸

We affirm the trial court’s judgment in favor of defendant, as well as the trial court’s determination that defendant is entitled to tax reasonable expert witness fees incurred in preparation for trial. However, we vacate the trial court’s award of \$6,070 for such expert witness fees and remand for a determination of the amount of fees taxable consistent with this opinion. Additionally, we conclude that defendant’s ordinance §§ 6.27 and 6.30 are preempted

⁸ For purposes of remand we note that “conferences with counsel for purposes such as educating counsel about expert appraisals, strategy sessions, and critical assessment of the opposing party’s position” are not “properly compensable as expert witness fees.” *City of Detroit v Lufran Co*, 159 Mich App 62, 67; 406 NW2d 235 (1987). Furthermore, expert witnesses may not be compensated for any “services” that exceed the scope of what such an expert would normally render. *Id.* Therefore, any time expended by defendant’s expert witnesses or their assistants not directly necessary to the preparation of opinion testimony intended to be presented in court was not compensable.

by NREPA. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Richard A. Bandstra

/s/ Karen M. Fort Hood

/s/ Alton T. Davis